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No. 03-1697

Supreme Court, U.S.
FILED
AUG 26 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, AND JOHN WOMACK,

Petitioners,

v.

JEANNETTE THOMPSON, AS PLENARY GUARDIAN OF ROBERT MAGYAR AND CECILIA MAGYAR,

Respondents.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

REPLY BRIEF FOR THE PETITIONER-OFFICERS

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REPLY BRIEF FOR PETITIONER-OFFICERS

The Florida Second District Court of Appeal, in its decision reversing the trial court's judgment granting the Petitioner-Officers qualified immunity, failed to address fundamental constitutional issues impacting the qualified immunity analysis. As explained in the petition of certiorari, that ruling conflicts with the greater weight of federal case law, casts doubt upon seizures performed under Florida's Mental Health Act and engenders confusion as to the amount of force that may be used during seizures. The Second District's holding also conflicts with decisions of this Court and the Eleventh Circuit Court of Appeals as to the scope of an individual officer's liability. Review by this Court is therefore clearly warranted.

1. Respondents contend that the Petitioner-Officers "resort to framing an issue that is presented neither by the opinion of the Second District nor by the record in this case" *Brief in Opp.*, at 7. Respondents' argument overlooks their Amended Complaint filed in this matter, which alleges violations of Mr. Magyar's First, Fourth, Fifth and Fourteenth Amendment Rights by the Petitioner-Officers in part because the Petitioner-Officers'

> actions in attempting to seize Robert Magyar's person were unreasonable, unjustified, unnecessary, and excessive to effect any lawful purpose that the Individual Defendants may have sought to accomplish. Such actions constituted (1) an unreasonable seizure of Robert Magyar under the Fourth and Fourteenth Amendments to the United States Constitution, (2) a deprivation of life and liberty without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and (3) a violation of

> Robert Magyar's right to freely associate with others under the First and Fourteenth Amendments to the United States Constitution.

App. 3e. The Respondents' claim alleging an unconstitutional seizure had to be addressed in order to fully decide the Officers' entitlement to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (concluding that when deciding whether an officer is entitled to qualified immunity, a court must first determine whether the officer's alleged conduct violates a constitutional right).

Respondents further argue: "petitioners contend the Second District failed to address their argument that Mr. Magyar was properly detained because they had probable cause to believe he was a danger to himself or others." *Brief in Opp.*, at 9. The issue the Second District Court failed to address was not an 'argument' launched by the Petitioner-Officers. Instead it was a mixed legal and factual finding made by the trial court as part of its ruling that the Officers were entitled to qualified immunity as a matter of law. App., *Pet. for Cert.*, at 3b-7b, 7b ¶ 7. Accordingly, the issue of whether the Officers had probable cause to detain Mr. Magyar should not be side-stepped or avoided.

It is true that the constitutionality of the Petitioner-Officers' seizure of Mr. Magyar does not end the qualified immunity analysis, because Respondents also assert that the force used in seizing Mr. Magyar was excessive. App., *Pet. for Cert.*, at 6e. But the constitutionality of the seizure must be the beginning of the analysis. *Saucier*, 533 U.S. 194, 201; *Graham v. Connor*, 490 U.S. 386, 388 (1989) (concluding that any analysis of excessiveness of the use of force requires a careful balancing of the nature and

quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake).

When an officer lawfully seizes an individual, even where the individual has not committed a crime, the seizing officer is entitled to use reasonable force to take the person into custody. *See, e.g., Mercado v. City of Orlando*, 323 F.Supp.2d 1266, 1272 n.5 (M.D. Fla. 2004) (*citing Graham*, 490 U.S. at 395; *Monday v. Oullette*, 118 F.3d 1099, 1104 (6th Cir. 1997); and Fla. Stat. § 394.463 (Florida's Mental Health Act)). Only after a full analysis of the constitutionality of the seizure is complete may an accurate application of the *Graham* factors be performed to determine whether any force used was excessive. *Saucier*, 533 U.S. at 201; *Graham*, 490 U.S. at 388.

The Petitioners seek this Court's review because the Second District Court of Appeal, rather than determining the constitutionality of the Officers' seizure, assumed the seizure was without legal and/or constitutional justification, despite the trial court's ruling to the contrary. By failing to address the constitutionality of the Officers' seizure, the Second District Court has cast doubt as to the constitutionality of the seizure of any individual who otherwise meets the criteria under Florida's Mental Health Act. The Second District's ruling has also engendered confusion among Florida law enforcement officers as to whether any amount of force may constitutionally be used during such a seizure. *Compare* App. 9a-15a *with* App. 3b-5b, 5b ¶ 7. This Court should accept certiorari to clarify this area of the law.

2. Respondents do not dispute that the greater weight of federal law holds that a Fourth Amendment analysis should be applied to determine whether a law enforcement officer lawfully seized an individual under state involuntary commitment laws. *See, e.g., Bailey v. Kennedy*, 349 F.3d 731, 739-42 (4th Cir. 2003) (relied upon by Respondents, *Brief in Opp.*, at 10, 14, 16 and 20, undertaking probable cause inquiry in determining constitutionality of seizure). Nor could Respondents so argue. *Linbrugger v. Abercia,* 363 F.3d 537, 541 (5th Cir. 2004); *Anthony v. City of N.Y.,* 339 F.3d 129, 136-38 (2nd Cir. 2003); *Doby v. DeCrescenzo,* 171 F.3d 858, 871 (3rd Cir. 1999); *Monday*, 118 F.3d at 1102; *District of Columbia v. Evans,* 644 A.2d 1008, 1015-17 (D.C. 1994); *Glass v. Mayas*, 984 F.2d 55, 58 (2nd Cir. 1993); *Sherman v. Four County Counseling Ctr.,* 987 F.2d 397, 401 (7th Cir. 1993); *Gooden v. Howard County*, 954 F.2d 960, 967-68 (4th Cir. 1992) (*en banc*); *Villanova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992); *Maag v. Wessler*, 960 F.2d 773, 775-76 (9th Cir. 1991); *LeSavage v. White*, 755 F.2d 814, 821 (11th Cir. 1985) (law enforcement officer was immune from liability for taking individual into custody under Florida's Mental Health Act where he had probable cause to believe detainee could be dangerous to herself or others); *Harris v. Pirch*, 677 F.2d 681, 686 (8th Cir. 1982); *Mercado*, 323 F.Supp.2d at 1272 n.5.

Instead, Respondents attempt to rehabilitate the Second District's opinion by making a broad comparison to the Second District's analysis with federal case law regarding use of excessive force. *Brief in Opp.,* at 7-17. The Second District Court's opinion, however, cannot be rehabilitated after the fact. This Court should grant certiorari to clarify the law as to the constitutionality of a seizure

under state involuntary commitment laws and the quantum of force that may lawfully be used during such a seizure.

3. Respondents contend that the Petitioner-Officers have failed to "cite [any] case suggesting that the Second District was required to detail every action by each officer denied qualified immunity." *Brief in Opp.*, at 18. The Petitioner-Officers relied upon the analysis in the concurrence of this Court's decision in *Saucier*, 533 U.S. at 211-12 (J. Ginsburg concurring) for the proposition that each officer claiming qualified immunity is entitled to a separate analysis of his individual actions. *Pet. for Cert.*, at 18. Respondents contend that because each of the Petitioner-Officers in some way participated in the seizure or use of force to detain Mr. Magyar, each officer should be denied his presumed protection under qualified immunity. *Brief in Opp.*, at 20. Review of Respondents' authorities reveals that there is, in fact, a federal circuit split with regard to the issue of an individual officer's liability for group actions. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (*citing Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), one of Respondent's authorities, *Brief in Opp.*, at 10, 11 and 15). Because this conflict affects the interests of the seven Officers, as well as the interests of thousands of law enforcement officers, this Court should accept certiorari to determine whether an individual officer is entitled to an analysis of his own actions in determining that officer's entitlement to qualified immunity.

The Ninth Circuit Court of Appeals applies the "integral participation" theory to find back-up officers whose actions were "integral" to the constitutional violation to be participants rather than mere bystanders and therefore liable, even where their own actions do not constitute a

constitutional violation. *Boyd*, 374 F.3d at 780 (relying for an example of the "integral participation" theory on *James ex rel. James v. Sadler*, 909 F.2d 834 (5th Cir. 1990), *see also*, *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989) (concluding, under the 'integral participation' theory, a sheriff's deputy could be individually liable for property damages caused by an unconstitutional search even though that particular officer's actions did not violate constitutional law). The Fifth Circuit Court of Appeals also follows the 'integral participation' theory and appears to have created this broad-based theory of liability. *Sadler*, 909 F.2d at 837-38; *Melear*, 862 F.2d at 1186.

In conflict with the "integral participation" theory is the 'mere presence' or 'mere back up' theory relied upon by the Second, Sixth and Eleventh Circuit Courts of Appeals. In *Ghandi v. Police Dep't of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984), *cert. denied*, 484 U.S. 1042 (1988), the Sixth Circuit stated:

> As a general rule, mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability.

Ghandi, 747 F.2d at 352. The 'mere presence' or 'mere back-up' theory provides qualified immunity to law enforcement officers present during alleged constitutional violations, whose actions, in and of themselves, do not constitute a constitutional violation. *Ghandi*, 747 F.2d at 352; *see also, Howard v. Schoberle*, 907 F.Supp. 671, 682 n.6 (S.D.N.Y. 1995) (specifically declining to apply *Sadler* and/or *Melear* to find a back-up officer liable under the Fifth Circuit's broader-based theory of liability, finding the Fifth Circuit's authorities in conflict with other federal circuits). In the context of excessive force, the Eleventh

Circuit has concluded that only an officer who uses excessive force or who is in a reasonable position to intervene to stop the use of excessive force is precluded from his otherwise presumed protection under the doctrine of qualified immunity. *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) (reversing denial of qualified immunity for police officer whose actions did not constitute a constitutional violation and who had no reasonable opportunity to intervene to prevent another officer from using excessive force).

In this matter, the seven Petitioner-Officers were treated by the Second District Court of Appeal as though they were one 'integral' defendant, without any meaningful analysis of their individual participation in the incident and/or Mr. Magyar's evidence against them precluding them from their protection under qualified immunity. App., *Pet. for Cert.*, 10a-15a. The Second District's opinion in this regard is contrary to Eleventh Circuit precedent and fails to apply the 'objective reasonableness' test to each of the Petitioner-Officers' actions, as contemplated by this Court. *Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed"); *Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight . . . [.]").

CONCLUSION

The greater weight of federal law applies a Fourth Amendment analysis to determine the lawfulness of an officer's seizure of an individual for purposes of psychological evaluation because the Second District Court of Appeal's opinion failed to address the constitutionality of Mr. Magyar's seizure, the Second District has cast doubt as to the constitutionality of an otherwise lawful seizure pursuant to Florida's Mental Health Act. This Court should accept certiorari to clarify this area of the law.

The authorities of the Ninth and Fifth Circuit Courts of Appeals are in conflict with the authorities of the Second, Sixth and Eleventh Circuit Courts of Appeal as to the scope of an officer's liability for the alleged unconstitutional actions of his fellow officers. This Court should accept certiorari to clarify this area of the law.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA GENERAL CIVIL DIVISION

JEANNETTE THOMPSON,
as Plenary Guardian of
ROBERT MAGYAR and
CECILIA MAGYAR, Individually,

Plaintiffs,

v.

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR M. GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, and JOHN WOMACK; and THE CITY OF TAMPA, FLORIDA, A MUNICIPAL CORPORATION.

Defendants. /

CASE NO.: 00-01147, DIV. "B"

AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR TRIAL BY JURY

Plaintiffs, Jeannette Thompson, as Plenary Guardian of Robert Magyar and Cecilia Magyar, individually, sue Defendants, Jarrold S. Douds, Franklin M. Drees, Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo, and John Womack (hereinafter collectively referred to as "The Individual Defendants"), and The City of Tampa, Florida, a Municipal Corporation (hereinafter referred to as "The Defendant City"), and allege:

JURISDICTION AND VENUE

1. This is a civil action for money damages based upon violations by Defendants, while acting under color of state law, of certain rights guaranteed under the United States Constitution by wrongfully and without just cause inflicting serious bodily injury upon Robert Magyar.

* * *

breath. He lapsed into a coma, and to this date, remains in a coma.

COUNT I – VIOLATION OF FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS (AGAINST THE INDIVIDUAL DEFENDANTS)

25. Plaintiffs reaver and incorporate by reference the allegations of paragraphs 1-23, as if fully set forth herein.

26. The Individual Defendants were at all times well aware that Robert Magyar was an individual under physical and mental disabilities. They were further well aware that Robert Magyar was unarmed, that he posed no danger to them or to others, and that he was not suspected of any criminal activity.

27. Nevertheless, the seven police officers set upon Robert Magyar, for the ostensible purpose of restraining his freedom of movement so that he could be placed into an ambulance and taken to a hospital to receive medical care, pinning him to the ground, seating themselves upon his person, striking him, and using other "pain compliance" techniques upon him.

28. As a direct and legal result of the excessive force used by The Individual Defendants to subdue, restrain,

and take into custody Robert Magyar, he received serious physical injuries which caused him to lapse into a chronic and persistent vegetative state.

29. The actions of the Individual Defendants were intentional, malicious, reckless, and done without any regard for the health, safety and welfare of Mr. Magyar.

30. The Individual Defendants' actions in attempting to seize Robert Magyar's person were unreasonable, unjustified, unnecessary, and excessive to effect any lawful purpose that The Individual Defendants may have sought to accomplish. Such actions constituted (1) an unreasonable seizure of Robert Magyar under the Fourth and Fourteenth Amendments to the United States Constitution, (2) a deprivation of life and liberty without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and (3) a violation of Robert Magyar's right to freely associate with others under the First and Fourteenth Amendments to the United States Constitution.

31. As a further result of The Individual Defendants' actions, Robert Magyar has suffered serious and permanent physical injuries, has been forced to endure great physical and mental pain and suffering, has lost the capacity for the enjoyment of life, has sustained and will continue to sustain medical expenses, and has lost earning capacity. All of Plaintiff's injuries are permanent or continuing in nature.

COUNT II – VIOLATION OF FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS (AGAINST THE DEFENDANT CITY)

32. Plaintiffs reaver and incorporate by reference paragraphs 1-23, as if fully set forth herein.

33. The Defendant City is a real party in interest in this action by virtue of §§ 111.065-.071, Fla. Stat., pursuant to which The Defendant City is obliged to defend and indemnify the liability asserted against The Individual Defendants.

34. Furthermore, The Defendant City was at all times aware that confrontations between police officers and individuals suffering from physical and mental disabilities carried the potential for injury, loss of life, and other similar, disastrous outcomes on the part of both the mentally and physically disabled individuals involved, and on the part of its police officers.

* * *

omissions of The Individual Defendants, did, by reason of Robert Magyar's disability subject Robert Magyar to discrimination and deny him the benefits of the services, programs or activities of the Defendant City afforded to other citizens, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12132.

WHEREFORE, Plaintiffs, Jeannette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar, individually, demand judgment against Defendants, Jarrod S. Douds, Franklin M. Drees, Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A Trigo, and John Womack; and the City of Tampa, Florida, together with costs, attorneys' fees, interest, and any other relief

this Court deems just and proper in the premises. Plaintiffs further request a trial by jury of all issues so triable.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 24th day of March, 2000, to: Peter M. Walsh, Esquire, 696 First Avenue North, Suite 304, St. Petersburg, Florida 33701.

/s/ Daniel P. Mitchell
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